

**SLOVER & LOFTUS**

ATTORNEYS AT LAW

1224 SEVENTEENTH STREET, N. W.  
WASHINGTON, D. C. 20036-3003

WILLIAM L. SLOVER  
C. MICHAEL LOFTUS  
DONALD G. AVERY  
JOHN H. LE SEUR  
KELVIN J. DOWD  
ROBERT D. ROSENBERG  
CHRISTOPHER A. MILLS  
FRANK J. PERGOLIZZI  
ANDREW B. KOLESAR III  
PETER A. PFOHL  
DANIEL M. JAFFE  
KENDRA A. ERICSON

TELEPHONE:  
(202) 347-7170

FAX:  
(202) 347-3619

WRITER'S E-MAIL:

cml@sloverandloftus.com

March 11, 2005

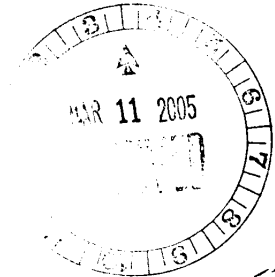
BY HAND DELIVERY

The Honorable Vernon A. Williams  
Secretary  
Surface Transportation Board  
1925 K Street, N.W., Room 711  
Washington, D.C. 20423-0001

ENTERED  
Office of Proceedings

MAR 11 2005

Part of  
Public Record



Re: Docket No. 42069, Duke Energy Corp. v. Norfolk Southern Ry., Docket  
No. 42070, Duke Energy Corp. v. CSX Transp., Inc., Docket No. 42072,  
Carolina Power & Light Co. v. Norfolk Southern Ry. (not consolidated)

Dear Secretary Williams:

Enclosed for filing in the above-referenced proceedings please find an original and ten copies of Complainant Duke Energy Corporation ("Duke") and Carolina Power & Light Company's ("CP&L") Joint Motion to Compel Discovery Responses on Phasing. In support of their Joint Motion, Complainants also submit for **FILING UNDER SEAL**, an original and ten copies of a Confidential set of Exhibits to the Joint Motion. These Exhibits include Defendants' Responses and Objections to Complainants' Requests, which the Defendants have designated as Confidential Information. We also have enclosed three computer diskettes which each include an electronic copy of the Joint Motion.

Finally, an extra copy of the Joint Motion is enclosed. Kindly indicate receipt and filing by time-stamping this copy and returning it to the bearer of this letter. Thank you for your attention to this matter.

Sincerely,

C. Michael Loftus

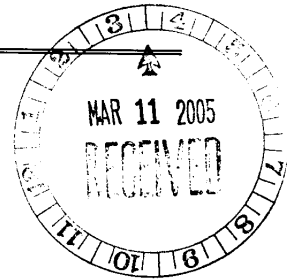
Enclosures

cc: Counsel for Defendants

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

DUKE ENERGY CORPORATION, )  
 )  
Complainant, )  
 )  
v. )  
 )  
NORFOLK SOUTHERN RAILWAY COMPANY )  
 )  
Defendant. )

213526  
Docket No. 42069



DUKE ENERGY CORPORATION, )  
 )  
Complainant, )  
 )  
v. )  
 )  
CSX TRANSPORTATION, INC., )  
 )  
Defendant. )

213528  
Docket No. 42070

ENTERED  
Office of Proceedings

MAR 11 2005

CAROLINA POWER & LIGHT COMPANY )  
 )  
Complainant, )  
 )  
v. )  
 )  
NORFOLK SOUTHERN RAILWAY COMPANY )  
 )  
Defendant. )

Part of  
Public Record  
213529  
Docket No. 42072

**COMPLAINANTS' JOINT MOTION TO  
COMPEL DISCOVERY RESPONSES ON PHASING**

OF COUNSEL:

C. Michael Loftus  
Robert R. Rosenberg  
Frank J. Pergolizzi  
Andrew B. Kolesar III

SLOVER & LOFTUS  
1224 Seventeenth St., N.W.  
Washington, D.C. 20036  
(202) 347-7170 (phone)  
(202) 347-3619 (fax)

SLOVER & LOFTUS  
1224 Seventeenth St., N.W.  
Washington, D.C. 20036

ATTORNEYS FOR DUKE ENERGY  
CORPORATION and CAROLINA  
POWER & LIGHT COMPANY

Dated: March 11, 2005

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

DUKE ENERGY CORPORATION,	)	
	)	
Complainant,	)	
	)	
v.	)	Docket No. 42069
	)	
NORFOLK SOUTHERN RAILWAY COMPANY	)	
	)	
Defendant.	)	
	)	
DUKE ENERGY CORPORATION,	)	
	)	
Complainant,	)	
	)	
v.	)	Docket No. 42070
	)	
CSX TRANSPORTATION, INC.,	)	
	)	
Defendant.	)	
	)	
CAROLINA POWER & LIGHT COMPANY	)	
	)	
Complainant,	)	
	)	
v.	)	Docket No. 42072
	)	
NORFOLK SOUTHERN RAILWAY COMPANY	)	
	)	
Defendant.	)	
	)	
	)	

**COMPLAINANTS' JOINT MOTION TO COMPEL  
DISCOVERY RESPONSES ON PHASING**

Pursuant to 49 C.F.R. §1141.31 and the Board's March 4, 2005 procedural order,<sup>1</sup>

Complainants' Duke Energy Corporation ("Duke") and Carolina Power & Light Company

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<sup>1</sup> As noted therein, "[t]hese proceedings are not consolidated. They are being handled together in a single decision for administrative convenience." Consistent with this order, Duke and CP&L are submitting a single joint motion to compel that applies to all three proceedings.

("CP&L") hereby move for an order compelling Defendants Norfolk Southern Railway Company ("NS") and CSX Transportation, Inc. ("CSXT") (collectively referred to herein as "Railroads") to produce documents in response to discovery requests served on Railroads in the respective cases. In particular, this motion addresses Duke's and CP&L's requests for information pertaining to railroad profitability analyses, traffic and revenue data, revenue masking factors and post-2005 pricing. As explained below, these requests seek information that are relevant to whether the rate increases involved in Docket No. 42069, *Duke Energy Company v. Norfolk Southern Ry. Co.* ("*Duke/NS*"), Docket No. 42070, *Duke Energy Company v. CSX Transportation, Inc.* ("*Duke/CSXT*"), and Docket No. 42072, *Carolina Power & Light Co. v. Norfolk Southern Ry. Co.* ("*CP&L/NS*"), should be subject to phasing. The text of the subject requests, and the Railroads' respective responses are attached hereto as Exhibits A (*Duke/NS*), B (*Duke/CSXT*) and C (*CP&L/NS*).<sup>2</sup> As reflected in Exhibits A, B and C, the Interrogatories at issue are numbered the same in each case and do not differ materially in terms of their substance. Similarly, the Document Requests that are the subject of this Motion share common numbering and minor variations in language that do not impact the content of this Motion.

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<sup>2</sup> The subject Responses and Objections have been designated as "Confidential" under the governing protective orders. While Duke and CP&L disagree that the entirety of these Responses and Objections need to be treated as confidential, they are filing the Joint Motion under seal to avoid needless disputes over confidentiality.

## ARGUMENT

### **I. RAILROADS' OBJECTIONS TO COMPLAINANTS' PHASING REQUESTS ARE BASED ON FLAWED PORTRAYALS OF THE DISCOVERY STANDARD AND THE PHASING CONSTRAINT**

#### **A. The Legal Standard**

The Board's regulations make clear that discovery may be obtained on "any matter, not privileged, which is relevant to the subject matter involved in a proceeding." 49 C.F.R. § 1114.21(a). In assessing relevance for purposes of discovery, the regulations further clarify: "It is not grounds for objection that the information sought will be inadmissible as evidence if the information sought appears reasonably calculated to lead to the discovery of admissible evidence." 49 C.F.R. § 1114.21(b). As provided at 49 C.F.R. § 1100.3, "[t]he rules will be construed liberally to secure just, speedy and inexpensive determination of the issues presented." See, e.g., Finance Docket No. 32821, *Bar Ale, Inc., v. California Northern R.R.* (STB served March 15, 1996), at 2 (noting that "the Board's rules of practice, *including the discovery rules*, are to be construed liberally to secure a just, speedy and inexpensive determination of the issues presented")(emphasis added).

This liberal approach to discovery has been expressly endorsed in the *Coal Rate Guidelines*. *Coal Rate Guidelines, Nationwide*, 1 I.C.C.2d 520, 548 (1985), *aff'd sub nom. Consolidated Rail Corp. v. United States*, 812 F.2d 1444 (3d Cir. 1987). These guidelines promote liberal discovery in application of the Constrained Market Pricing standards set forth therein, including the Phasing Constraint. *Id.*, 1 I.C.C.2d at 548 ("We recognize that shippers

may require substantial discovery to litigate a case under CMP, and we are prepared to make that discovery available to them.”).

In addition, the Board’s July 26, 2002 discovery ruling in these proceedings recognized that liberal discovery is generally available under the Board’s rules. *Duke/NS, et al.*, STB served July 26, 2002, at 4. While the Board also noted that such discovery “must be narrowly drawn, directed to a relevant issue, and not used for a general fishing expedition,” *id.*, these requirements should not be misinterpreted to alter the broad view of discovery that has consistently been applied in Board proceedings, including rate cases.

**B. Duke and CP&L’s Discovery Requests Comply with the Board’s Discovery Standards and Are Relevant to Phasing**

In order to demonstrate that their discovery requests comply with the above standards, it is not necessary for Duke and CP&L to show that they would prevail on the merits of the claims they intend to raise. Rather, Duke and CP&L simply must show that the requested information is reasonably calculated to lead to the discovery of admissible evidence, and that the requests are narrowly drawn to obtain information on a relevant issue. Duke’s and CP&L’s discovery requests clearly meet these standards.

The instant cases will be the first cases in which the Board applies the Phasing Constraint. As the Board noted in *Duke/NS, et al.*:

At times a rate that may not have been proved unreasonable under a SAC test may be an increase that causes significant economic dislocation *or* have other inequitable consequences that may need to be mitigated for the public good.

*Duke/NS*, (STB served Nov. 6, 2003), at 40 (emphasis added). In considering whether such

phasing is appropriate in these cases, however, the Board noted that the Commission's *Coal Rate*

*Guidelines* provide only cursory guidance on the subject of phasing:

The phasing constraint has not yet been applied in a case, and the Guidelines provide only cursory guidance on the subject. Therefore, if Duke elects to pursue relief under the phasing constraint, the parties should be prepared to address whether phasing is appropriate under the circumstances presented here, what level of rate increases would violate that constraint, and an appropriate means for applying the phasing constraint.

In proposing ways to apply the phasing constraint the parties should be mindful that any approach should tie the phasing constraint to the revenue needs of the defendant railroad. Moreover, it should provide some restraint to a railroad's pricing even if the railroad falls far short of the Board's measure of revenue adequacy or has only a small base of potentially captive shippers to cover its revenue shortfall.

*Duke/NS*, (STB served Nov. 6, 2003), at 40.

Further, in its October 20, 2004 decision in *Duke/NS, et al.*, the Board explained that phasing may be appropriate here because the challenged rates reflect "unusually large" increases over prior rates:

Although none of the challenged rate levels has been shown to be unreasonable under the SAC test, the SAC test is not the only regulatory constraint on railroad pricing. In each of these cases, the challenged rates represented unusually large rate increases, and it may be that those increases violated the Board's phasing constraint. *See Coal Rate Guidelines*, 1 I.C.C.2d at 546-47; *Duke/NS* at 39-41; *Duke/CSXT* at 32-33.

*Duke/NS*, (STB served Oct. 20, 2004), at 25.

The description of the Phasing Constraint in the *Coal Rate Guidelines* encourages the consideration of a variety of factors in determining the reasonableness of the Railroads' need to collect the challenged rate increases immediately.<sup>3</sup> In addressing this issue, the Commission

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<sup>3</sup> As explained by the Commission, the Phasing Constraint relates "not to the reasonableness of the ultimate rate level, but to the reasonableness of collecting it immediately."

expressed its view that “in some instances otherwise justified rate increases could cause significant economic dislocation which must be mitigated for the greater public good.” *Coal Rate Guidelines*, 1 I.C.C.2d at 546. The Commission cautioned, however, that “the degree of phasing should be tailored to the equities of the situation at hand,” 1 I.C.C.2d at 546, and that consideration of this constraint requires a “balancing of the equities of the particular situation.” *Id.* at 547. The Commission enumerated several factors that are appropriate to consider in balancing the equities, including *inter alia*, “the short-term revenue requirements of the railroads, the magnitude of the proposed increase, and the magnitude of past increases.” *Id.* In setting forth these other factors, the Commission gave no indication that they should not be considered absent a prerequisite finding of economic dislocation. The Commission also did not limit consideration of these other equitable factors to consideration solely in the context of the challenged rates – *i.e.*, it is entirely appropriate to consider the Railroads’ short-term revenue needs and the magnitude of the challenged rate increases in the context of the Railroads’ rate-setting practices for other shippers, and in particular other coal shippers.

The information that Duke and CP&L seek to compel through this Motion is thus highly relevant to the Board’s consideration of phasing. Through these requests, Duke and CP&L seek information that they will use to present evidence concerning: the Railroads’ revenue adequacy; the Railroads’ respective short-term revenue needs; analyses relating to the magnitude of the rate increases approved in the underlying decisions; the magnitude of past rate increases by comparison; and equitable factors relating to such increases, including the size of the increases in relation to increases on other traffic, and in particular other coal traffic. In presenting these

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*Coal Rate Guidelines*, 1 I.C.C.2d at 547 n. 72.



analyses, Duke and CP&L will contend that the consideration of these factors requires consideration of whether the increases at issue here are equitable in light of the Railroads' revenue needs and their pricing of other traffic. The requested information is, accordingly, all highly relevant to factors that the Board will consider in applying the Phasing Constraint.

The Railroads cannot seriously dispute that the requests are narrowly drawn to elicit the requested information. This is not the type of generalized "fishing expedition" that the Board has cautioned against – Duke and CP&L are not aimlessly casting about for information with no plan for how they will use that information if obtained. Rather, as further explained below, each of the requests has been carefully drawn and is directly linked to an analysis that Duke and CP&L intend to conduct that is relevant to one of the phasing factors discussed above. The requests seek discrete categories of documents, or data, that are readily available in the Railroads' files.

**C. The Standard Advanced by the Railroads**

The Railroads' responses and objections to the requests that are the subject of this Motion posit a far different standard for discovery that is based on erroneous portrayals of both the Phasing Constraint and the discovery standards described above. Accordingly, the Railroads' attempt to preclude discovery is flawed for several reasons.

First, the Railroads mistakenly argue that Duke and CP&L must "establish the essential predicate for phasing relief – *i.e.*, that immediate implementation of the challenged rates would cause significant economic dislocation." See *Duke/NS* Response, Exhibit A at 4 ("In the present case, Duke simply cannot make a *prima facie* showing on the essential predicate for a phasing order – significant economic dislocation to Duke or its customers caused by the

challenged rates.”). The Railroads further suggest that until this predicate is established, the Board does not need to reach any other equitable considerations that may pertain to phasing. From this erroneous premise, the Railroads argue that they are exempt from any discovery on topics other than economic dislocation. While the *Coal Rate Guidelines* do make reference to the phrase “significant economic dislocation” in the context of the Commission’s rejection of the proposed fifteen percent (15%) threshold, the *Guidelines* do not impose any requirement of the nature advocated by the Railroads. Instead, they treat the Phasing Constraint as an inquiry that is to be based upon a balancing of the equities. See *Guidelines* at 546. In essence, if the Railroads’ condition precedent objection were sustained, all phasing proceedings would have to be bifurcated with an initial phase examining economic dislocation and a second phase addressing the other factors – a result that clearly is not contemplated by either the *Coal Rate Guidelines*, the Board’s January 6, 2005 procedural schedule, or the parties’ submissions in support of the request for such a schedule.

Further, in advancing its condition precedent objection, the Railroads take issue with the Board’s own interpretation of its *Coal Rate Guidelines*. Specifically, the Railroads object to language in the *Duke/NS* Decision served November 6, 2003 that states the Board’s understanding that phasing may be appropriate where the challenged rate increases cause *either* “economic dislocation *or* have other inequitable consequences:”

The suggestion in *Duke/NSR* that phasing might be appropriate to mitigate “inequitable consequences” other than “significant economic dislocation” is not supported by the ICC’s analysis in the *Guidelines* decision. *Guidelines* makes clear that the prerequisite for seeking relief under the phasing constraint is a showing that implementation of the full challenged rate would cause “significant economic dislocation” that must be mitigated to accommodate “the public need for smooth, orderly economic transitions.”

See Railroads' Reply to Complainants' Appeal at 5 n.1. However, the Phasing Constraint is, by its very nature, an equitable remedy. As noted earlier, in its *Coal Rate Guidelines* the Commission specifically referred to phasing relief being "tailored to the equities of the situation at hand," 1 I.C.C.2d at 546, and requiring a "balancing of the equities of the particular situation." *Id.*, at 547. Clearly, the Board's statement that phasing is appropriate where either economic dislocation *or* other inequitable consequences are present is consistent with the *Coal Rate Guidelines* and reflects a correct understanding of the standards to be applied under the Phasing Constraint.

Second, another critical misconception in the Railroads' discovery standard is the erroneous claim that Duke and CP&L *are not* advancing claims of economic dislocation. In its General Objections, NS states: "Recognizing the fundamental reality that it cannot prevail under the governing legal standard – because it cannot show significant economic dislocation due to the challenged rates – Duke is attempting to divert the debate to other matters." See *Duke/NS* and *CP&L/NS* Responses, Exhibits A and C at 5, respectively. On the contrary, as reflected in their answers to Railroads' discovery requests on phasing, Duke and CP&L are indeed claiming that there has been significant economic dislocation. There is absolutely no basis for the Railroads' suggestion that Duke and CP&L have conceded or abandoned claims of economic dislocation. Rather, Duke and CP&L's discovery logically focuses on the factors relating to the Railroads because the Railroads' files are not likely to include data and information relating to the economic impacts of their rate increases on Duke and CP&L. Instead, their files are the source of data that is most relevant to the other factors discussed above relating to the Railroads' revenue needs and consideration of the magnitude of the rate increases. Accordingly, to the extent that

Railroads' relevancy objection is premised on the failure to seek discovery from the Railroads on economic dislocation, it is simply illogical.

Third, even if one were to accept the Railroads' restrictive view that in order to *prevail* on a phasing claim Duke and CP&L must *first* show economic dislocation, Duke and CP&L would still be entitled to the discovery requested herein. The Railroads acknowledge that the other factors described above would be relevant *if* Duke and CP&L submit evidence of economic dislocation. Under governing discovery standards, this admission is critical. Where, as here, there is a claim of the allegedly essential predicate, discovery on the issue subject to the predicate should clearly be considered reasonably calculated to lead to admissible evidence. By way of contrast, the Board has consistently allowed parties to simultaneously conduct discovery on market dominance and stand-alone cost issues in maximum rate cases, despite the fact that the SAC issue is dependent on a finding of market dominance. If one were to accept the Railroads' condition precedent approach to discovery, all maximum rate case discovery could be subject to a similarly restrictive and bifurcated discovery process.

Finally, the Railroads' proposed standard for discovery would wreak havoc in future phasing proceedings. The proposed bifurcated approach to conducting phasing discovery would require two stages of discovery, two evidentiary steps and multiple decisions from the Board before phasing could be fully adjudicated.

**II. THE REQUESTED INFORMATION IS  
RELEVANT AND SHOULD BE COMPELLED.**

**A. Profitability Studies/Benchmarks**

As noted above, Duke and CP&L have propounded several requests that seek information pertaining to Railroads' revenue adequacy and the evaluation of the profitability of their traffic, and/or the extent to which such analyses relate to the manner in which rates are established. *See e.g.*, Interrogatory Nos. 1 through 4 and Document Request Nos. 7, 9<sup>4</sup>, 10 and 14 through 19. Specifically, Duke and CP&L are seeking documents that include summaries and/or analyses of the profitability of the Railroads' coal movements. The purpose of these requests is to evaluate the magnitude of the rate increases imposed on Duke and CP&L in the context of the profit margins under such rates as compared to the profit margins on the Railroads' other coal movements. The requested information would also be relevant to Railroads' short term revenue needs and may show the Railroads are moving certain traffic at a loss.<sup>5</sup>

Both Railroads object to producing any responsive analyses that are based on internal management costing practices. They have offered to produce documents reflecting comparative revenues, but not profitability, and have suggested that Duke and CP&L can perform their own profitability analyses using the revenue information produced and comparing

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<sup>4</sup> At the STB Discovery Conference on March 2, 2005, Duke and CP&L agreed to narrow Document Request No. 9 to requests for formal reports that are transmitted to management level employees on a special study basis, or at regular intervals (*e.g.*, quarterly).

<sup>5</sup> Duke and CP&L submit that in considering the Railroads' revenue needs for purposes of phasing, such losses should be factored out. While such moves may also be identified using URCS, the relative degree of the loss may not be fully reflected.

the revenues to regulatory costing data, as maintained in the Uniform Railroad Costing System (“URCS”).

Duke and CP&L believe that the requested documents should be produced, regardless of which cost system is used. The Railroads’ suggestion that the comparative analysis can be generated or recreated by performing analyses using URCS misses the point. To the extent that NS and CSXT possess responsive documents that reflect the relative profitability of their movements these documents should be produced in the format in which they are maintained. While Duke and CP&L recognize that discovery of management cost information has been denied in past cases, the use of the information in the context of this phasing proceeding differs substantially from the proposed use in other maximum rate cases. Surely, the way the Railroads evaluate the profitability of their rail rates for business decision-making purposes is highly relevant to the evaluation of the equities of imposing the entire challenged rate increases at one time versus phasing them over some reasonable period. It is likewise, highly relevant to an appropriate balancing of the Railroads’ revenue needs. Here, the use of the information will be limited to the use of the outputs for purposes of the equitable analysis. In seeking these analyses, Duke and CP&L are not seeking any information that would reveal the internal management cost *methodologies* used by either defendant railroad. Rather, to the extent management cost information were to be produced, it would simply reflect the output of this costing system.

**B. Revenue/Traffic Data and Masking Factors.**

In the prior stages of this proceeding, the Railroads produced substantial traffic and revenue data in the form of computerized traffic and revenue data, car movement files and

contract information. Document Request Nos. 1 and 2 seek production of updated information for the years 2001 through the present. As noted in the Motions to Compel filed by Duke and CP&L on March 8, 2005, the Railroads are willing to update the production of coal transportation contracts, subject to an order compelling this production under the governing protective orders.

The Railroads, however, have objected to production of the updated computerized traffic and revenue data and car movement records on both relevance and burden grounds. As noted above, the relevance of the traffic and revenue data is related to the consideration of the *Coal Rate Guidelines* phasing factors which consider the Railroads' revenue needs, the magnitude of the rate increases and other equitable factors.

The Railroads' burden objection is premised on the time, effort and expense that would be associated with generating the updated computer records. As explained at the March 2, 2005 discovery conference, the Railroads' claim the production of the databases sought through Document Request Nos. 1 and 2 would cost in excess of \$100,000 to produce. Although Duke and CP&L believe the Railroads' burden objection is greatly exaggerated, they offered a substantial compromise that would greatly limit any burden that would be associated with the production of the computerized traffic and revenue data. As detailed in the February 28, 2005 Joint Report, Duke and CP&L have obtained access to the Board's Costed Waybill Sample ("Waybill Sample") for NS and CSXT for the years 2001 through 2003. Duke and CP&L have offered to use the Waybill Sample, in lieu of the computerized records requested through Document Request Nos. 1 and 2, subject to the following conditions: (1) the Railroads would be compelled to produce the revenue masking factors that are the subject of Document Request No.

20; (2) the Railroads would produce the computerized traffic and revenue data solely for calendar year 2004; (3) the Railroads would not counter evidence based on the Waybill Sample with information obtained from the databases that they object to producing; and (4) the Railroads, while free to reply to the analyses conducted with the Waybill Sample, would not argue that the sample was not representative or otherwise statistically invalid.

The Railroads' rejected this compromise offer at the March 2 discovery conference, stating two principal concerns. First, the Railroads claim that the revenue masking factors cannot be revealed to Duke and CP&L because they have never been produced before. This objection is also stated in the Railroads' Objections to Document Request No. 20, and the Railroads' Reply Memorandum to Duke and CP&L's February 14, 2005 Appeal of Denial of Request for Waybill Information, which the Railroads incorporate into their objections to Document Request No. 20. Second, the Railroads refuse to produce *any* documents in response to Document Request Nos. 1 and 2 – even if these requests are limited to 2004. Instead, the Railroads contend that Duke has already obtained movement-specific information relating to coal and non-coal traffic handled by NS through the Waybill Sample (albeit without access to the revenue masking factors). *See* Exhibit A at 16. The Railroads further suggest that Duke and CP&L do not need the masking factors because they can use the waybill information, and the contracts that will be produced, to perform the rate comparisons that they wish to make.

In an effort to address the Railroads' concerns relating to the production of the 2004 data, Duke and CP&L have considered whether there are any acceptable substitutes for this data. In this regard, Duke and CP&L are aware that railroads provide waybill sample data to the STB's contractor, Railinc, on either a monthly or quarterly basis (depending on the Railroad),



together with all definitions, decoders, instructions, masking factors and/or other information necessary to access and utilize the data produced. Thus, while all of the information for 2004 may not presently be in the Board's possession, Duke and CP&L submit that it may be possible to update the Waybill Sample based on the data for 2004 that has been provided by NS and CSXT to the Board's contractor, Railinc, to date. If the same data were produced by the Railroads in discovery, Duke and CP&L could then rely on the Waybill Sample for 2001 through the most recent period, together with the masking factors and contract information, and would not need to burden the Railroads with the production of the 2004 computerized traffic and revenue data.

As Duke and CP&L explained at the Discovery Conference, and in their Waybill Appeal, production of the Railroads' revenue masking factors will greatly reduce the burdens of discovery and will cause no harm to railroads. As the Board noted in *Conrail*, there is no burden associated with the production of the masking factors: "Production by CSX and NS of their revenue masking factors should not be particularly difficult." *Conrail* at 7 n. 25. Particularly given that the due dates for Duke and CP&L to submit their opening evidence is imminent, requiring Duke and CP&L to perform a study of the computerized traffic and revenue data requested through Document Request Nos. 1 and 2, or to delink the revenues from the Waybill Sample and contract data, will both involve a complicated process that will increase the time, burden and costs that would be necessary to prepare their evidence within the time-frames of the procedural schedules in these proceedings.<sup>6</sup>

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<sup>6</sup> Pursuant to this procedural schedule, Opening Evidence in the *Duke/CSXT* proceeding is due on April 27, 2005; in the *Duke/NS* proceeding on May 2, 2005; and in the *CP&L/NS* proceeding on May 6, 2005.

The Board is well-acquainted with shipper concerns relating to the costs associated with maximum rate litigation in recent years. As Chairman Nober has noted to Congress:

Preparing that evidence and presenting it to the Board are very expensive – parties have testified that a SAC case can cost as much as \$3 million to prosecute, \$5 million to defend, and generate more than 700,000 pages of material.

*Testimony of Roger Nober, Chairman of the Surface Transportation Board, House Committee Transportation and Infrastructure Subcommittee on Railroads, Hearing on the status of Western Railroad Economic Regulation, at 6, March 31, 2004.* In the same testimony, Chairman Nober noted the Board's actions in attempting to reduce the costs associated with these cases, including procedures designed to streamline discovery and encourage the resolution of discovery disputes through staff conferences.

The Board is now faced with a new offshoot of the maximum rate litigation process – the first ever proceedings under the Phasing Constraint. The compromise that Duke and CP&L propose through the use of the Waybill Sample and masking factors represents a much more efficient and economic way to provide access to the relevant information than any of the alternatives offered by the Railroads. This compromise will address any legitimate concerns that the Railroads may have concerning the production of updated computerized data, while at the same time giving the information to the shippers in a format that can be used efficiently.

The Board should not reject this compromise in favor of alternatives that unnecessarily increase the cost for captive rail shippers to seek relief from massive rate increases in a phasing proceeding. Allowing access to the confidential unmasked revenue fields and revenue masking factors, subject to appropriate confidentiality constraints, is consistent with the

Board's stated goal of reducing the cost of these cases, while causing no hardship to the Railroads.

Further, the Railroads' objections based on confidentiality are disingenuous and do not present a valid basis for finding that the Railroads could be harmed by disclosure of the masking factors subject to the governing Protective Orders in these proceedings. As the Railroads have noted, they have already produced highly sensitive revenue and traffic data in these proceedings, including traffic tapes containing detailed movement specific traffic and revenue information and highly confidential coal transportation contracts. The Railroads have also agreed to produce updated information that would likewise reveal highly confidential contract information. The production of the masking factors, *in lieu* of the updated traffic and revenue data, would actually provide Duke and CP&L with information that is *less* commercially sensitive than the detailed traffic and contract information that has already been produced. Accordingly, rather than protecting the Railroads' from any legitimate confidentiality concerns, all that denial of the masking factors achieves is to increase greatly the time, effort and expense that will be required by Duke and CP&L to prepare evidence that could more readily be presented using the existing Waybill Sample data, plus the masking factors.

Finally, the Railroads' repeated refrain that the masking factors should not be compelled because they have never been produced before should not serve as a basis to deny production in this case. The Board has never before been presented with a phasing proceeding, much less one relating to the imposition of rate increases of the magnitude presented for review in these proceedings. In considering the scope of discovery in this case of first impression, the Board should take a broad view of the discovery that is permissible.

**C. Post-2005 Pricing Documents**

Duke and CP&L's Document Request No. 6 seeks information relating to Railroads' post-2005 rate-setting practices. Duke and CP&L submit that this information is relevant for the same purposes as the contract information and traffic and revenue data for the historical pre-2005 period – namely, this information will reflect on the magnitude of the increases to Duke and CP&L as compared to other shippers. Further, the rate-setting practices of the Railroads in the post-Board approval of the challenged rates in these proceedings are relevant to consideration of the Railroads' revenue needs and reflects their own views on the extent to which it can, or should, phase-in rate increases.

In addition to its blanket relevancy objection, the Railroads' also object to providing responsive documents to Document Request No. 6 is based on concerns about the highly confidential nature of its rate quotations and concerns that disclosure of this information could be prejudicial in ongoing or future negotiations.

As explained above, the Railroads' relevancy objection is based on its mistaken view that shippers must prove economic dislocation as a condition precedent to seeking discovery on the other phasing factors recognized in the *Coal Rate Guidelines*. Duke and CP&L respectfully submit that the Railroads' confidentiality objection is equally unavailing. The information pertaining to post-2005 pricing can be adequately protected as "Highly Confidential" information subject to the governing protective orders in these proceedings.

**CONCLUSION**

For the foregoing reasons, Duke and CP&L's Motion to Compel should be granted and the Railroads should be ordered to produce responsive information to Interrogatory

Nos. 1-4 and Document Request Nos. 1, 2, 6, 7, 9, 10 and 14 through 17 of Exhibits A, B and C, hereto. Alternatively, *in lieu* of producing the documents and computer data sought through Document Request Nos. 1 and 2, the Board should compel the Railroads to produce the revenue masking factors requested in Document Request No. 20, together with all waybill information, including all definitions, decoders, instructions, masking factors and/or other information necessary to access and utilize the data produced, that has been submitted by NS and CSXT to the Board's contractor to date for calendar year 2004.

Respectfully submitted,



By: C. Michael Loftus  
Robert R. Rosenberg  
Frank J. Pergolizzi  
Andrew B. Kolesar III  
SLOVER & LOFTUS  
1224 Seventeenth St., N.W.  
Washington, D.C. 20036  
(202) 347-7170 (phone)  
(202) 347-3619 (fax)

ATTORNEYS FOR DUKE ENERGY  
CORPORATION and CAROLINA POWER  
& LIGHT COMPANY

OF COUNSEL:

SLOVER & LOFTUS  
1224 Seventeenth St., N.W.  
Washington, D.C. 20036

Dated: March 11, 2005

**CERTIFICATE OF SERVICE**

I hereby certify, that I have this 11th day of March, 2005 caused to be served copies of the Complainants' Joint Motion to Compel Discovery Responses on Phasing by hand delivery on counsel for defendant Norfolk Southern Railway Company and CSX Transportation, Inc. as follows:

G. Paul Moates, Esq.  
Paul A. Hemmersbaugh, Esq.  
Sidley Austin Brown & Wood  
1501 K Street, N.W.  
Washington, D.C. 20005

(via hand delivery);

George A. Aspatore, Esq.  
Norfolk Southern Corporation  
Three Commercial Place  
Norfolk, VA 23510-2191

(w/o Exhibits via overnight mail); and

Ellen M. Fitzsimmons, Esq.  
Peter J. Shudtz, Esq.  
Paul R. Hitchcock, Esq.  
CSX Transportation, Inc.  
500 Water Street  
Jacksonville, FL 32202

(w/o Exhibits via overnight mail).

  
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Frank J. Pergolizzi  
An Attorney for Complainants